

DATE: January 30, 2008

TO: Region Engineers
Region Delivery Engineers
TSC Managers
TSC Delivery Engineers
Resident/Project Engineers
Engineer of Construction & Technology

FROM: Larry E. Tibbits
Chief Operations Officer

John C. Friend
Engineer of Delivery

SUBJECT: Bureau of Highway Instructional Memorandum 2008-02
Review of Contractor Claims
(Supersedes Construction Circular Letter 1996-4, and Office Memorandum:
Supplemental Guidelines – Central Office Review Claims Process, dated
October 1, 1997)

The attached Michigan Department of Transportation Claims Procedure provides the process for submittal and review of a contractor's claim. The claim review process involves a formalized two-step administrative progression. The intent of these procedures is to establish a process that requires an increased level of attention, accountability, and urgency by the contractor and department alike. Also attached is a claims process flowchart. The process step durations delineated on the flowchart and within the procedures are intended to be maximum timeframes with any request for an extension to the durations, whether by the contractor or the department, documented in writing.

The revised procedures no longer require a project level/TSC hearing. The intention is to provide maximum opportunity and flexibility outside the formal process for the TSC delivery engineer and manager to resolve claims. However, removal of the formal project level/TSC hearing does not allow the contractor to proceed directly to the region level.

These procedures include the establishment of a statewide claims tracking database. The Construction and Technology Division (C&T) will monitor and track the data for trends that require action. This database is under development. On an interim basis, each region will maintain a spreadsheet with pertinent information regarding the resolution of all claims within the region. The interim claims tracking spreadsheet is available on C&T's intranet Web site at http://connect.michigan.gov/portal/site/mdot/?epi_menuItemID=c5d6357c22a33ddf61082337ccfa2a0&epi_menuID=4ca206389dd39f9f61082337cccfaf2a0&epi_baseMenuID=aebd150013844d67e0cc4eb6cccfaf2a0 under "Resources and Services." Each region must submit their

spreadsheet to Keith Brown, C&T's Construction Contracts Engineer, by January 31st of each year for the previous calendar year. When the statewide claims tracking database is complete, the regions will transition to the new database. To facilitate the transfer of data from the interim spreadsheets to the claims tracking database, it is essential that you **do not** make changes to the interim spreadsheet provided.

MDOT's Special Provision for Claim Review Process documents the changes to sections 104.09 and 108.10 of the *2003 Standard Specifications for Construction*. These changes include a new Claim Content and Certification Form (MDOT Form 1953). This revised procedure will replace Section 103.2 in the next revision of the *Construction Manual*.

The department will send the attached letter to all prequalified contractors to notify them of the revised procedure.

Chief Operations Officer

Engineer of Delivery

Attachments

BOHD:C/T:BJO:kar

Index: Central Office Review

cc: C & T Division Staff
J. Polasek
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ACEC
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MICHIGAN DEPARTMENT OF TRANSPORTATION CLAIMS PROCEDURE
(Revised 2008)

CONTRACTOR NOTICE OF INTENT TO CLAIM – The contractor's Notice of Intent to File Claim shall conform to the requirements of Subsection 104.09 or 108.10. Upon receipt of the contractor's Notice of Intent to File Claim, the transportation service center (TSC) delivery engineer will:

- A. Sign and date the contractor's Notice of Intent to File Claim.
- B. Return a signed copy of such notice to the contractor.
- C. Send a copy of the signed notice to the TSC manager and region engineer.
- D. Create a claim data record in the claims tracking database (CTD) by inputting the general project information, the date of receipt of the contractor's Notice of Intent to File Claim, and the claim description.

On local agency projects –

- The contractor shall:
 - A. Submit the Notice of Intent to File Claim to the local agency engineer.
 - B. Send a copy of the notice to the TSC delivery engineer.
- The TSC delivery engineer will:
 - A. Upon receipt, sign and date the contractor's Notice of Intent to File Claim.
 - B. Return a signed copy of such notice to the contractor.
 - C. Send a copy of the signed notice to the local agency engineer.
 - D. Send a copy of the signed notice to the TSC manager and region engineer.
 - E. Create a claim data record in the CTD by inputting the general project information, the date of receipt of the contractor's Notice of Intent to File Claim, and the claim description.

CLAIMS PROCESS – Upon the contractor filing a Notice of Intent to File Claim, the contractor and the TSC delivery engineer will work to resolve the claim issue before the disputed work begins. Upon the claimed work being completed or final acceptance, if the matter described in the Notice of Intent to File Claim is not resolved at the TSC level, the contractor may pursue the matter using the following procedure:

- A. The contractor shall submit a written request for a Region Office Review (ROR) to the TSC delivery engineer.
- B. The contractor shall submit a claim package that meets the requirements of Subsection 104.09.D and E to the TSC delivery engineer.
- C. The TSC delivery engineer will record the date the claim package was received in the CTD.
- D. The TSC delivery engineer will assemble all documents and records deemed relevant or necessary to support the department's position on the claim.

- E. The TSC delivery engineer will compile the contractor and TSC claim packages, and submit them to the region engineer.
- On local agency projects:
 - A. The TSC will conduct informal local agency reviews to resolve claim issues at the lowest level.
 - B. The TSC will be the lead for the joint TSC/local agency presentation at the ROR.
 - C. The region will be the lead, for the joint region/local agency presentation at the Central Office Review (COR).

If the matter described in the Notice of Intent to File Claim on local agency projects is not resolved thru TSC involvement, the contractor may pursue the matter using the following procedure:

- A. The contractor shall submit a written request for a ROR to the TSC delivery engineer and the local agency engineer.
- B. The contractor shall submit a claim that meets the requirements of Subsection 104.09.D and E to the TSC delivery engineer and the local agency engineer.
- C. The TSC delivery engineer will record the date the claim package was received in the CTD.
- D. The local agency engineer will assemble all documents and records deemed relevant or necessary to support the department/local agency position on the claim.
- E. The TSC delivery engineer will compile the claim packages and submit them to the region engineer.

Upon receipt of the claim package from the TSC, the region engineer will:

- A. Record the date the claim packages were received in the CTD.
- B. Create a “claim file” that will include all documents submitted by the contractor, and all documents supporting the position of the TSC delivery engineer.
- C. Schedule the ROR for a date no later than 55 days following the region engineer’s receipt of the claim package from the TSC.
- D. Record the scheduled date of the ROR in the CTD.

If in reviewing the claim file for completeness the region engineer deems additional information is necessary to better understand the contractor’s claim or the TSC delivery engineer’s position, the region engineer will make a request for additional information in writing to the contractor and the TSC delivery engineer. Requested information will be submitted in the timeframe specified by the region engineer. When the claim file has been deemed complete, the region engineer will:

- A. Determine whether the claim issue(s) is(are) independent or related.
- B. Document that determination in the claim file.
 - If the claim issue(s) is(are) determined to be independent, a copy of the claim file will be provided to the contractor no less than 7 days prior to the ROR.

- If the claim issue(s) is(are) determined to be related and all the related claim issues are included in the claim file, a copy of the claim file will be provided to the contractor no less than 7 days prior to the ROR.
- If the claim issue(s) is(are) determined to be related to another yet un-filed claim issue, the claim file is returned to the TSC delivery engineer.
- C. Hold the ROR within 55 days of the region engineer's receipt of the claim package from the TSC.
- D. Issue the written ROR claim decision to the contractor within 30 days of the ROR.
- E. Record the date of the ROR claim decision in the CTD.

Upon receipt of the ROR claim decision, the contractor has 30 days to initiate one of the following options:

- Accept the ROR decision in whole.
- Accept the ROR decision on the independent, unrelated claim issues.
- Accept the ROR decision on the related claim issues.
- Appeal the ROR decision in whole.
- Appeal the ROR decision on the independent, unrelated claim issues.
- Appeal the ROR decision on the related claim issues.

If the contractor accepts the ROR claim decision in whole or in part:

- A. The contractor's acceptance shall be documented in writing to the region engineer.
- B. The region engineer will record the date of receipt of the contractor's letter of acceptance, and the terms accepted, in the CTD.
- C. If the ROR claim decision requires a contract modification, it will be submitted to the contractor for signature within 30 days of the region engineer's receipt of the contractor's letter accepting the claim decision.
- D. The region engineer will record the date the contract modification is submitted to the contractor for signature in the CTD.

If the contractor does not accept the ROR decision, in whole or in part:

- A. The contractor shall submit a written appeal to the region engineer within 30 days of receipt of the ROR decision. The written appeal shall include the information required in Subsection 104.09.E, as well as the contractor's argument in countering the region engineer's decision.
- B. The region engineer will record the date of receipt of the contractor's written appeal in the CTD.

If the contractor fails to accept or appeal the ROR decision, in whole or in part, in writing within 30 days of receipt of the ROR claim decision, that failure to respond in writing shall constitute acceptance of the ROR decision by the contractor. If the ROR decision requires a contract modification, it will be submitted to the contractor for signature within 30 days.

Within 30 days of the written appeal, the region engineer will:

- A. Submit the contractor's appeal and 7 copies of the claim file to the COR moderator (hereafter: moderator).
- B. Submit 1 copy of the claim file to the contractor.

Within 30 days of the moderator's receipt of the region engineer's submission of the claim file, the moderator and panel members will review the claim file to ensure that all of the information needed to respond to the issues raised in the claim are available for review at the COR. If it is determined that additional information is needed, the moderator will request the contractor or region engineer to supply the information.

The requested information shall be submitted to the moderator within 15 days of the moderator's request. If additional information is submitted by either party, the moderator will distribute the information packet to the opposite party at least 10 days prior to the date of the COR.

The COR will be scheduled and conducted no later than 90 days following the receipt of the contractor's appeal to the region engineer. Once the COR is scheduled:

- A. The moderator will record the date the COR is scheduled and the date the COR is conducted in the CTD.
- B. The director or his/her representative will issue the written COR claim decision to the contractor within 60 days of the COR.
- C. The moderator will record the date the COR claim decision is issued in the CTD.

Upon receipt of the COR claim decision, the contractor has 30 days to initiate one of the following options:

- A. Accept the COR decision in whole.
- B. Accept the COR decision on the independent, unrelated claim issues.
- C. Accept the COR decision on the related claim issues.

If the contractor accepts the COR claim decision, in whole or in part, that acceptance shall be documented in writing to the director or his/her representative within 30 days of the date the COR claim decision is issued. The region engineer will record the date of receipt of the contractor's letter of acceptance and the terms accepted in the CTD.

If the COR claim decision requires a contract modification, it shall be submitted to the contractor for signature within 30 days of the director's or his/her representative's receipt of the contractor's letter accepting the claim decision. The TSC delivery engineer will record the date the contract modification is submitted to the contractor for signature in the CTD.

If the contractor fails to accept the COR decision, in whole or in part, in writing within 30 days, that failure to respond in writing shall constitute acceptance of the COR decision by the contractor. If the COR decision requires a contract modification, it will be submitted to the contractor for signature within 30 days.

If the contractor does not accept the COR decision, the contractor shall notify the department of the non-acceptance within 30 days of the date the COR claim decision is issued.

GENERAL PROVISIONS

- Extension requests to exceed the claim process durations given in the attached claims process flowchart (CPF), whether by the contractor or the department, must be approved and recorded in the CTD by the region engineer. All delays occurring in the timeline given in the CPF will need to be justified in writing to the region engineer
- Decisions made by the department at any stage in the claim process shall not constitute an admission of liability or set future precedent.
- An independent, unrelated claim issue is an issue that has no interrelationship to any other claim issue(s). Independent, unrelated claim issues may be advanced through the claims process at the written request of the contractor. The region engineer will determine which claim issues are independent.
- Related claim issues cannot be separated as they move through the claim process. The contractor cannot accept an approval of a decision on one of the related issues and appeal the decision on the other related issue. If the contractor appeals either of the decisions, both issues must advance to the next level.
- Following is the format for ROR and COR meetings:
 - A. Contractor presentation.
 - B. Department presentation/rebuttal.
 - C. Contractor rebuttal.
 - D. Panel questions at anytime.
- The region engineer will determine the ROR panel composition and sign the decision letter. The region engineer may or may not sit on the panel.
- A ROR claim decision of the region engineer does not constitute final department action until all approvals required by the contract are properly obtained.
- The COR panel shall consist of three department engineers who have had no prior involvement in the subject contract. The COR panel composition is:
 - Region engineer(s) – 1 to 3 per panel, based on the panel chair's determination of the claim's complexity.
 - Lansing division engineer/region associate/TSC manager – 0 to 2 per panel based on the panel chair's determination of the claim's complexity.
 - TSC delivery engineer (minimum 3 years construction experience) – 0 to 1 per panel based on the panel chair's determination of the claim's complexity.

- A region engineer will be appointed chair of the COR panel and is responsible for the written COR decision.
- If the COR panel is short one member on the day of the COR, a construction staff engineer or division engineer with no involvement in the subject contract may fill in as a substitute panel member.
- The moderator will be the chief operations officer or his/her designee. The moderator's role is to facilitate the COR meeting, and he/she will not participate in the decision making process of the COR.
- The COR shall be limited to a review of the material in the claim file, the material submitted as part of the appeal, material provided to the moderator in writing at least 10 days prior to the COR, and the oral representation made at the COR. No new material may be presented at COR hearing without approval of the panel chair.
- The COR claim decision, signed by the director's representative (the engineer of delivery), will constitute the department's final decision regarding the claim.
- If the ROR or COR panel chair determines the claim package has changed or new claim issues have been introduced, the claim package will be remanded back one step.
- The contractor's written acceptance of a ROR or COR panel's decision on a claim item(s) constitutes a settlement of the claim item(s) and bars the contractor from pursuing further legal remedies against the department on the settled claim item(s).
- The term "day", as used in the CPF and this claims process, means a calendar day. Should any specified time begin or end on a Saturday, Sunday or legal holiday, the specified time shall begin or end, as applicable, on the next business day following the Saturday, Sunday or legal holiday.
- A local agency has no appeal rights for claim decisions.
- It is the responsibility of the contractor to provide a copy of the region file to any subcontractor involved in the claim.
- The contractor shall notify any subcontractors and/or suppliers with an interest in the claim of the scheduled COR time, date, and location.
- The contractor shall notify the region or central office at least 10 days prior to the review, if the contractor will have legal representation present.

- If the department will have a representative present from the Attorney General's Transportation Division at either the ROR or COR, the region engineer or COR moderator will notify the contractor at least 10 days prior to the ROR or COR.
- The region engineer or COR moderator will ensure attendance by a representative from the Attorney General's Transportation Division if the contractor indicates he will have legal representation at the review.
- ROR or COR chairpersons have the option of hiring a "ghost writer" to write decision letters on claims at the region and COR levels. The ghost writer should be someone with past MDOT construction experience and will participate in the claim review meeting as a non-voting panelist. MDOT will pay the cost of the ghost writer's services.
- ROR or COR chairpersons have the option of hiring technical experts to assist on claims involving issues with which they have little or no experience. For example, the construction of buildings, complex hi-tech electrical systems, or unique bridges. Region engineers should contact the Construction and Technology Division for assistance in locating and hiring the needed expertise. MDOT will pay the cost of such technical expertise.
- The Construction and Technology Division will review data related to all ROR and COR decisions, and monitor the data for trends that require action. All ROR and COR decision letters will be circulated to region engineers, TSC managers, resident engineers, division engineers, and staff engineers for their review.
- COR decision letters should be streamlined to focus on the COR panel's decision. The recommended format includes:
 - A brief statement of the claim with a reference to the COR packet for greater detail and documentation of the region and contractor's positions.
 - A statement of any new factors considered by the COR panel that were not previously considered and documented in the COR packet.
 - An explanation on the COR panel's decision.

There is no need to completely restate the region's previous decision. When this abbreviated format is used, attach the previous claim decision letters to the COR letter.

FEDERAL PARTICIPATION IN CONTRACTOR CLAIMS AND COURT AWARDS –

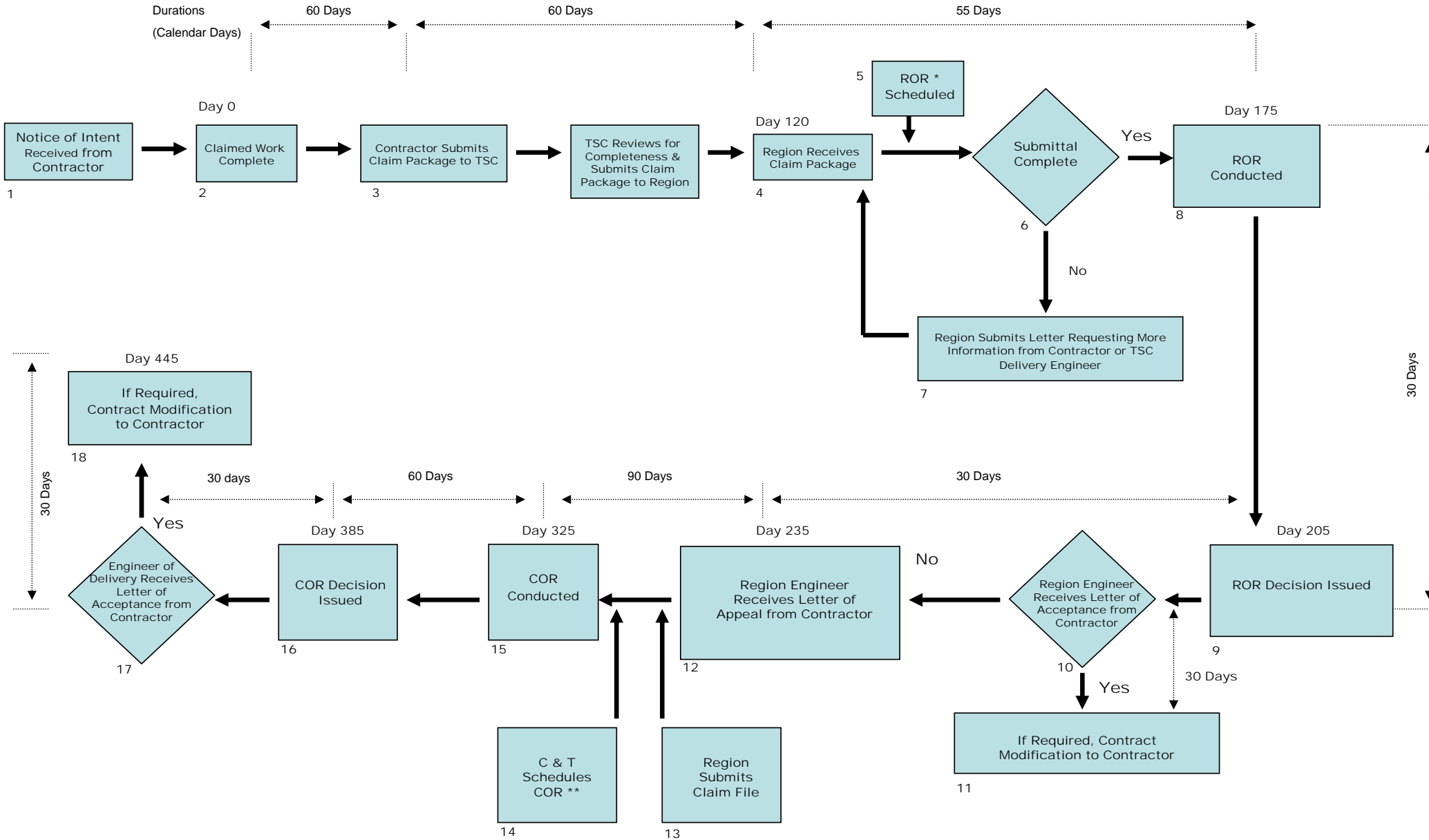
Federal regulations (23 CFR Section 635.124) require that "FHWA shall be made aware by the SHA of the details of the claim at an early stage so that coordination of efforts can be satisfactorily accomplished" . . . "Federal participation can be approved provided that:

- 1) The FHWA was consulted and concurred in the proposed course of action
- 2) All appropriate courses of action had been considered; and
- 3) The SHA pursues the case diligently and in a professional manner."

The following procedure is necessary when MDOT plans to request federal participation in any settlement to a contractor as a result of a claim on a construction contract:

- A. The TSC may seek advice of an FHWA area engineer on claim issues. MDOT is not required to notify FHWA area engineers of individual claims unless it is on an FHWA oversight project (non-exempt) that results in an extra or an adjustment of more than \$50,000.
- B. FHWA does not need to be notified in advance of a region claim meeting. However, the region must send a copy of the region claim meeting minutes to the appropriate FHWA area engineer on all federal aid projects, regardless of oversight responsibility.
- C. When MDOT's Construction and Technology Division sends notification of a COR meeting, the FHWA's engineering and operations manager shall be included in this notification on all federal aid projects, regardless of oversight responsibility. FHWA may attend the COR meeting as an observer.
- D. When MDOT's Construction and Technology Division distributes minutes of the COR meeting, the FHWA's engineering and operations manager shall be included in this distribution on all federal aid projects, regardless of oversight responsibility.
- E. The Attorney General notifies the Construction and Technology Division when a contractor files a lawsuit as a result of a claim on any federal aid project, regardless of oversight responsibility.
- F. MDOT's Construction and Technology Division mails a copy of the lawsuit on all federal aid projects, regardless of oversight responsibility, to the FHWA's engineering and operations manager. The cover letter shall request FHWA review and determination of the extent of involvement in the litigation and participation in any settlement that may result.
- G. FHWA sends a letter to MDOT's Construction and Technology Division to either:
 - Request a meeting with the Construction and Technology Division and the Attorney General assigned to the case to discuss and reach agreement on the proposed course of action and level of FHWA involvement, or
 - Request that MDOT continue to keep FHWA's engineering and operations manager informed during the course of the litigation.The letter will also address FHWA participation in the claim.
- H. MDOT's Construction and Technology Division shall notify the FHWA's engineering and operations manager when the Attorney General is involved in serious settlement discussions. If requested by FHWA, a meeting with MDOT's Construction and Technology Division and the Attorney General will be scheduled to go over acceptance or rejection of the proposed settlement. At this meeting, the three groups will discuss the legal and factual aspects, and reach concurrence on a course of action.
- I. After the lawsuit is settled, MDOT's Construction and Technology Division will send FHWA's engineering and operations manager a letter with the court order. If an award is made, a request for FHWA participation shall be included.
- J. If participation is requested, FHWA will respond in writing to MDOT's Construction and Technology Division, with a copy to MDOT's Financial Operations Division.
- K. If approved for federal participation, additional federal funds will be reimbursed using the normal financial reimbursement procedures.

CLAIMS PROCESS FLOWCHART (CPF)



Any extension requests to exceed the durations given in above process by contractor or owner, must be approved by the Region Engineer. All delays occurring in timeline will need to be justified in writing to the Region Engineer.

* ROR - Region Office Review
 **COR - Central Office Review

Date: 6/28/07



STATE OF MICHIGAN

DEPARTMENT OF TRANSPORTATION
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

KIRK T. STEUDLE
DIRECTOR

January 30, 2008

TO: ALL PREQUALIFIED CONTRACTORS

Procedures for Review of Construction Contract Claims

The Michigan Department of Transportation (MDOT) issued Bureau of Highway Instructional Memorandum (BOH IM) 2008-02, *Review of Contractor Claims* on January 30, 2008. The BOH IM is available on MDOT's Web site at www.michigan.gov/mdot/ under Maps and Publications – Manuals, Guides, Advisories & Memos – BOH–Instructional Memorandums. BOH IM 2008-02 supersedes information on this subject transmitted to all Prequalified Contractors by Construction Circular Letter 1996-4.

The referenced claim procedures are established as stipulated in the:

- *2003 Standard Specifications for Construction*
- *2003 Interim Standard Specifications for Construction*
- *1996 Standard Specifications for Construction*

The new procedures hereby established shall be strictly observed by the contractor and the department in connection with a claim by the contractor seeking extra compensation or an extension of time. The intent of the procedures is to establish a process that requires an increased level of attention, accountability, and urgency by the contractor and department alike. The process step durations delineated on the flowchart and within the procedures are intended to be maximum timeframes, with any request for an extension to the durations, whether by the contractor or the department, documented in writing.

These claim procedures shall become effective March 1, 2008, and shall be applicable to a claim filed with the delivery engineer for projects on which no claimed work has been started prior to March 1, 2008, or the contractor's notice of intent has not been filed prior to March 1, 2008.

The region engineer may agree to incorporate claims filed prior to March 1, 2008, into this process to facilitate resolution of existing claims.

Sincerely,

Brenda J. O'Brien, P.E.
Engineer of Construction and Technology